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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1950

No. 267

J. J. O'LEARY, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT,

Petitioner,

v.

BROWN-PACIFIC-MAXON, INC., A Corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, A Corporation

Respondents.

BRIEF OF RESPONDENTS

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Opinion Below

The opinion of the Court of Appeals for the Ninth Circuit is reported at 182 F. 2d 772. (Tr. 64, 65).

Question Presented

Whether compensation order of petitioner in awarding decedent's mother compensation under the Longshoremen's and Harbor Workers' Act is supported by evidence and consistent with law when uncontroverted testimony established decedent workman had completed the day's outing at recreational park in Guam maintained by employer for use of general public and while preparing to leave the park for his quarters, in violation of his employer's orders, drowned while swimming to the attempted rescue of an unidentified person summoning assistance from an adjoining reef in the ocean.

Statutes Involved

The Defense Bases Act of August 16, 1941, as amended, 56 Stat. 1035, 42 U.S.C. §1651, et seq., extends the provision of the Longshoremen and Harbor Workers' Compensation Act (Act of March 4, 1927) c 509, 34 Stat. 1424 as amended by 33 U.S.C. §901, et seq. to the employment involved in this appeal.

The pertinent provisions of the Longshoremen and Harbor Workers Act are as follows:

> "Section 2. Definitions. WHEN USED IN THIS ACT—
>
> * * *
>
> 2. The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."
>
> Sec. 21. REVIEW OF COMPENSATION ORDERS—
>
> * * *
>
> (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *."

STATEMENT

The deceased, at the time of his death by drowning on November 9, 1947, was employed by respondent Brown-Pacific-Maxon, Inc. at Guam, Marianas Islands, as a mechanic. Brown-Pacific-Maxon, Inc. had a construction contract with the U. S. Navy. Respondent Hartford Accident & Indemnity Company was its insurance carrier, insuring its employees under the terms of the Defense Bases and the Longshoremen & Harbor Workers' Compensation Acts. Decedent's mother, Mary Valak, filed a claim for compensation for death benefits under the provisions of the Longshoremen and Harbor Workers' Act. Respondents controverted her claim upon the grounds that decedent's death did not "arise out of" and "in the course of his employment," as required by Section 2 of the Act and a hearing was held before the Deputy Commissioner resulting in the entry of the following order of March 2, 1949:

> "* * * that the employer maintained and supervised a recreation center at Camp Etheridge; that said recreational center was maintained for the benefit of employees of the employer and others; that it was common practice for the employees of the employer to use such recreational facilities thus provided, on Sundays and weekdays, whenever they were disposed to use them; that for such purpose the employer transported its employees to and from the recreational center without charge; that on Sunday, November 9, 1947, the deceased herein was availing himself of the use of the recreational center; that during the afternoon of said day it appeared to the onlookers on shore that two men were in distress on one of the reefs; that the deceased, along with a number of other persons, joined in an attempt to rescue the two men and

> while so engaged the deceased was drowned and his body was not recovered until the following day; that at the time of his drowning and death the deceased was using the recreational facilities sponsored and made available by the employer for the use of its employees and such participation by the deceased was an incident of his employment, and that his drowning and death arose out of and in the course of said employment, and was not occasioned by his wilful intention to injure or kill himself; * * *." (Tr. 8-9).

Respondents petitioned the United States District Court for an injunction to enjoin enforcement of the compensation order (Tr. 2). The United States District Court in a decree entered August 19, 1949, affirmed the petitioner's order, holding that there was substantial evidence to support the same. (Tr. 13). Respondents appealed to the United States Circuit Court of Appeals, where the District Court was reversed. (Tr. 65).

Statement of Evidence Before Deputy Commissioner

Respondent Brown-Pacific-Maxon, Inc. maintained a recreational camp at Camp Etheridge, Guam, for the use of its own employees and those of the general public (Tr. 8). It furnished transportation to and from the camp to its employees who were housed elsewhere. Because of the hazardous nature of the channels and reefs in the Pacific Ocean adjoining Camp Etheridge, the camp was posted with warning signs forbidding any camp patron to swim elsewhere than in the swimming pool of the camp (Tr. 41) where lifeguards were provided (Tr. 42). Several Naval personnel and civilians had been drowned previously in the treacherous reefs and river channel adjoining Camp Etheridge, which

was responsible for the posted prohibitions against swimming or entering the Pacific Ocean (Tr. 42).

On Sunday afternoon, November 9, 1947, about 4:30 P.M., Valak and one Butryn, both employees of respondent Brown-Pacific-Maxon, Inc., were preparing to return to their quarters from the camp, where they had spent the holiday, when they heard the shouts of an unidentified person standing on a reef in the channel, about 330 yards from shore, summoning assistance (Tr. 46, 47, 48).

Butryn and Valak, in violation of the posted orders, jumped into the ocean and attempted to swim in the direction of the unidentified individual. Butryn preceded Valak by about 100 yards, and then turned back as he was making no headway, (Tr. 28) as the currents were so strong they could only float, and were being rapidly carried in the direction of the hazardous river channel and reefs (Tr. 32). Butryn warned Valak not to continue (Tr. 32) but Valak persisted, and ultimately was drowned before he could be rescued. Another would-be rescuer, one Modahl, likewise was drowned before he could be rescued (Tr. 52) as the result of the foolhardy but well-meant rescue attempt.

The unidentified individual responsible for this tragedy was in no danger of being drowned at any time, since he was sitting on a life raft which had become obstructed (Tr. 33). He was subsequently rescued by an amphibious duck, but never identified as to name or employment (Tr. 31, 33).

Summary of Argument

Valak's death did not "arise out of" and "in the course of" employment, antecedent conditions for com-

pensability under Section 2 of the Longshoremen and Harbor Workers' Act (33 U.S.C. 903) for the following reasons:

1. The risk to which Valak voluntarily exposed himself in violation of posted orders was not peculiar to his work or employment nor incident to his contract of employment.

2. By voluntarily exposing himself to danger in violation of posted orders of his employee, Valak deviated from his role as an employee and assumed added risks not incident to his employment.

3. The risks assumed by Valak were not risks which a reasonably prudent person would comprehend as risks incidental to his employment.

4. Valak's death was not the result of any emergency requiring him to protect his employer's property or interests.

5. Valak's act was for the sole benefit of unidentified persons, who like Valak were acting in violation of the employer's orders in swimming in the ocean.

6. Valak was not acting in furtherance of his employer's interests when he drowned.

ARGUMENT

I.

Injury to be Compensable Must Have Causal Relation to Industry

The Longshoremen and Harbor Workers' Act, (hereafter referred to as the Act) is workmen's compensation or industrial insurance legislation. It is not designed to afford the worker the broad protection ordinarily provided by life, accident, or health policies. It

is only intended to insure the worker against the particular hazards of his calling. It is not general insurance.

Travelers Insurance Co. v. Borden, (CCA Texas) 94 F. 2d 880.

Amucci v. Ford Motor Co., 13 N.W. 2d 245.

The one fundamental principle of workmen's compensation litigation which has continuously been enunciated by the courts is that compensation can only be paid for an injury which has some causal relation to industry. Administration of Workmen's Compensation Act, Dodd (1936) p. 681.

This court, in the case of *Cudahy Packing Co. v. Parramore,* 263 U.S. 418, 68 L. ed. 366, said at page 369:

> "* * * It may be assumed that where an accident is in no manner related to the employment, an attempt to make the employer liable would be so clearly unreasonable and arbitrary as to subject it to the ban of the Constitution; * * *."

This causal relation constitutionally required between injury and employment is usually expressed as in Section 3 of the Act in the statutory provision that the injury shall be one "arising out of" and "in the course of" employment.

This dual requirement of causation has been defined by the leading authority, *McNicol's* case, 215 Mass. 497, 192 N.E. 697, as follows:

> "* * * It is sufficient to say that an injury is received 'in the course of' the employment when

> it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

As a short hand definition of this statutory phrase, it is commonly said that the words "arising out of" refer to the origin of the cause of the accident and "in the course of" refers to the time, place and circumstances of the injury. *Mazursky v. Industrial Commission*, (Ill.) 4 N.E. 2d 823.

In construing this conjunctive phrase of causation, found in Section 2 (33 U.S.C. §902) of the Longshoremen & Harbor Workers' Act, Federal Courts have invariably followed the definition in the *McNicol's* case.

In *Ayers v. Hoage*, 63 F. (2d) 364) the Circuit Court of Appeals for the District of Columbia defined the above statutory phrase as follows:

> "An injury 'arises out of' the employment within the meaning of the Compensation Act when it occurs in the course of the employment and as the result of a risk involved in or incidental to the employment or to the conditions under which it is required to be performed. The mere fact that the injury is contemporaneous or coincident with the employment is not a sufficient basis for an award. *Indemnity Insurance Co. of North America v. Hoage*, 61 App. D.C. 173, 58 F. 2d 1074, 60 Wash. Law Rep. 450; *Madore v. New Departure Mfg. Co.*, 104 Conn. 709, 134 A. 259, 261. In the *Madore* case the court said: 'Before he can make a valid award, the trier must determine that there is a direct causal connection between the injury whether it be the result of accident or disease, and the employment. The question he must answer is: Was the employment a proximate cause of the disablement, or was the injured condition merely contemporaneous or coincident with the employment? If it was the latter, there can be no award made'."

This same Circuit in the later case of *Fazio v. Cardillo*, 109 F. 2d 835, said:

> "* * * In *Ayers v. Hoage*, 61 App. D. C. 388, 63 F. 2d 364, we said that an injury arises out of employment when it occurs in the course of the employment and as the result of a risk involved in or incidental to the employment or to the conditions under which it is required to be performed, and we added that the fact that the injury is contemporaneous or coincident with employment is not alone a sufficient basis for an award. * * *."

In the *Cudahy Packing* case, supra, this court agreed that the injury to be compensable must have a causal connection with employment, saying:

> " * * * And this is not to impose liability upon one person for an injury sustained by another with which the former has no connection; but it is to say, that it is enough if there be a causal connection between the injury and the business in which he employs the latter—a connection substantially contributory, though it need not be the sole or proximate cause. Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, has a tendency to promote a more equitable distribution of the economic burdens in cases of personal injury or death resulting from accidents in the course of industrial employment, and is a matter of sufficient public concern (*Mountain Timber Co. v. Washington*, 243 U.S. p. 239, 61 L. ed. 697, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D 642, 13 N.C.C.A. 927), to escape condemnation as arbitrary, capricious, or clearly unreasonable. Whether a given accident is so related or incident to the business must depend upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case. * * * "

> " * * * Upon this question of causal relationship, the English decisions are instructive. In *Pierce v. Provident Clothing & Supply Co.* (1911) 1 K.B. 997, 80 L.J.K. B.N.S. 831, 104 L.T.N.S. 473, 27 Times L.R. 299, 55 Sol. Jo. 363, 4 B.W.C.C. 242, where a collector of the company, while riding a bicycle in the course of his employment, with the acquiesence of the company, was knocked down and killed by a tramcar, the employer was held liable because, by reason of his duties, the employee was more exposed to the risks of the streets

than ordinary members of the public. In the opinion by Buckley, L. J., it is said (1911) 1 K.B. p. 1003):

> 'An accident arises out of the employment where it results from a risk incidental to the employment, as distinguished from a risk common to all mankind, although the risk incidental to the employment may include a risk common to all mankind'."

II.

Wanton Incurrence of Special Danger

Valak's humane but foolhardy act of plunging into the treacherous waters of the Pacific Ocean to attempt to rescue an unidentified individual places him beyond the ambit of his employment. He voluntarily placed himself in a position of danger where his employment did not carry him so the risk cannot be said to be incident to his employment, which he had temporarily abandoned.

The prevailing rule is well epitomized in 71 C.J. 657 as follows:

> "* * * An accident cannot be said to arise out of the employment where it is due to a new and added peril to which the employee by his own conduct has needlessly exposed himself * * *."

In *Northwestern Pacific R. Co. v. Industrial Accident Commission*, (Cal.) 163 Pac. 1000, a railroad traffic clerk traveling on business descended to render aid to a passenger injured attempting to board the train. The train started after the injured passenger was placed aboard, and the clerk was killed in attempting to board the moving train.

In denying compensation to the widow under the California Workmen's Compensation Act, the court said at page 1003:

> "Heretofore in our decisions it has been frequently pointed out that the language of our law justifying an award only when an employe is performing services 'growing out of and in the course of his employment' is taken from the earlier English act upon the same subject, and under familiar principles was adopted with the construction which the courts of that country had put upon that language. A consideration of the English adjudications will show, first, that upon principle it cannot be said that the accident here occurred while the deceased was performing service either growing out of or incidental to or in the course of his employment. Furthermore, a reading of those cases will disclose that not only upon principle, but upon adjudications presenting the precise question of an employe boarding a moving car under circumstances such as this, it has been uniformly held that injuries thus sustained are not within the purview of the law. Some of these cases have heretofore been considered in *Ocean Accident & Guarantee Co. v. Industrial Accident Commission,* 159 Pac. 1041. Others to the same effect are *Anderson v. Fife Coal Co.,* S.C. 8, 4, Scott, L. R. 3, 3 B.W. Comp. Cas. 539; *Fletcher v. The Duchess,* A.C. 671, 81 L.J.K., B. (N.S.) 33; 55 Sol. Jo. 598, 4 B.W. Comp Cas. 317, 105 L.T. (N.S.) 121; *Losh v. Evans,* 51 Week. Rep. 243, 18 Times L.R. 142; *Hendry v. Caledonian Ry. Co.,* S.C. 732. The proposition is as stated in 1 Dresser, Employer's Liability, §104:
>
> " 'When a servant of his own accord and without the direction of his master steps outside the scope of his employment, whether on the master's business or his own, the master owes him no duty

as to the dangers he encounters and is not liable for any injury received.'

"And the particular principle clearly applicable to the case at bar is that an employe, even when in the performance of his duty, may not impose upon his employer any greater risk and responsibility that that inhering in the character of the duty itself."

III.

Violation of Employer's Orders

The testimony before the petitioner established that swimming in the Pacific Ocean about Camp Etheridge by camp patrons was strictly forbidden by respondent employer, which posted signs about the camp to this effect and maintained security police to enforce this ruling.

The decedent's acts which resulted in his drowning were in disobedience of these explicit orders. While decedent's action cannot be characterized as "willful misconduct" as that term is used in Section 2 of the Act, his transgression of the posted orders proximately resulted in his death and precludes recovery by decedent's mother under the Longshoremen's and Harbor Workers' Act.

It is well settled that if the rule of employment which the claimant breaks limits his sphere of employment, and injury results, it is non-compensable, although not so if the violation of orders dealt simply with the employee's conduct while acting within his employment.

Going into or remaining in a forbidden place is held to place the workman beyond the scope of employment when injured.

These principles are discussed in an extensive annotation to *Fournier v. Androscoggin Mills* (Me.) 113, Atl. 270, found in 23 L.R.A. 1172.

IV.

Humanitarian Acts for the Benefit of Third Parties Not In Course of Employment

Valak's conduct was undoubtedly actuated by humanitarian motives, but when injury results to a workman engaged in the voluntary performance of such an act for the sole benefit of third parties, it is held to be non-compensable.

The record presents no emergency condition involving possible damage to the employer's property. Valak's act bore no relation to the furtherance of his employer's interests.

The applicable rule stated in 58 Am. Jur. §235, page 740 is as follows:

> "* * * Accordingly, an injury received by an employee while using an instrumentality of the employer solely for the benefit of himself or of a third person, *or while voluntarily engaged on an errand of mercy,* having no connection with or relation to his employment, is not compensable, ordinarily. * * * (Italics ours)

The following authorities are typical of this applicable rule of law, which requires affirmance of the lower court's ruling denying compensation.

In the case of *Sichterman v. Kent Storage Company* (Mich.) 186 N.W. 498, 20 A.L.R. 309, it was held that

an injury to a salesman traveling in his own motor car to make his calls, when he has left his car and gone to the assistance of another person hit by another's automobile on the highway, does not arise out of his employment within the meaning of the Workmen's Compensation Act. The court in holding that the claimant had deviated from the course of his employment at the time of his accident, employed language applicable to the case at bar. The court said:

> "This unfortunate accident occurred when deceased was performing an act of humanity, entirely disassociated from the master's work. It did not arise out of the employment.
>
> "The award must be vacated."

Followed in *Feiber v. Leonard Rolf Jones* (Mich.) 279 N.W. 870.

In *De Salvio v. Menihan Co.* (N.Y.) 121 N.E. 766, where the injured workman wished to say good-by to a fellow workman before he went to the front and crossed a room and received certain injuries, the court said:

> "In each of these cases an award was sustained because the court was able fairly to say that between the work for which the employee was engaged and the disputed act which led to the accident, there was, either naturally or as the result of some act of the employer or of custom, a real relationship which brought the accident within the range of employment, and, therefore, it could be said to have arisen out of and in the course of the employment.
>
> "But in the present case we search in vain for any such feature or relationship. There was no con-

nection between the employment for which claimant was engaged, of marking soles, and his trip across the shop to say good-by to a fellow employee. This act did not enable him either directly or indirectly in any tangible sense, the better to perform his work, discharge his duties, or carry forward the interests of his employer. It was not a natural incident to the work for which he was hired. It did not grow out of any emergency where he was justified in taking an unusual step to protect his employer's interests. It was simply and solely the expression of a private desire and the consummation of a personal purpose. However natural and even commendable his act may have been, it was neither beneficial to his employer nor to himself in the way of completing and performing his work."

V.

Error of Petitioner's Order

Petitioner's order is premised upon the fact that since Valak, prior to his ill-fated rescue attempt was using his employer's recreational facilities, his death "arose out of" and was "in the course of" his employment. This is decidedly a non-sequitur and ignores the uncontradicted testimony of Valak's deviation and abandonment of his scope of employment at the time of his death.

Valak's injury did not occur as the proximate cause of the use by him of recreational or transportation facilities furnished by his employer as in the case of *Liberty Mutual Insurance Co. v. Gray*, 137 F. (2d) 927. It occurred as the result of positive disobedience of recreational orders promulgated by his employer.

As the opinion of the court below aptly observed:

> "The lethal currents were not a part of the recreational facilities supplied by the employer and the swimming in them for rescue of the unknown man was not recreation. It was an act entirely disconnected from any use for which the recreational camp was provided and was not in the course of Valak's employment." (Tr. 65.)

The fact that immediately prior to Valak's drowning he was using the camp recreational facilities maintained by his employer for use by the general public is of no legal significance. The mere fact that incidents of his employment may have caused him to patronize the camp facilities, and that but for his employment he would not have been at Camp Etheridge prior to his drowning is not of itself sufficient to give rise to a right to compensation.

> *Ayers v. Hoage,* supra;
> *Fazio v. Hoage,* supra;
> *Great American Indemnity Co. v. Industrial Commission,* 11 N.E. (2d) 9.

The rationale of the case of *Pillsbury v. Liberty Mut. Ins. Co.,* 143 F. (2d) 807, decided by the Ninth Circuit, precludes recovery of compensation under the Act in this case. There, a workman employed in the United States to work in Hawaii was waiting in Oakland until passage to Honolulu was available. While out on a stroll he was injured. In that case it was urged his injury "arose out of" and "in the course of employment." In disallowing compensation, the court said:

> "We are unable to see any difference with reference to Keil's function as an employee between this 'stroll' in Oakland and his injury while attend-

ing an evening performance in a moving picture theatre in an Hawaiian town of his defense plant by the collapse of the building. In a remote sense the recreation of the stroll in the Oakland Park and on the waterfront and the entertainment of the cinema may make a more efficient laborer. So also he might work better the next day because of a dose of bicarbonate of soda after his dinner. The Act has yet to be interpreted as making the employer an *insurer* for the employee accidentally swallowing strychnine or for the collapse of the theater. No more did it insure Keil against accident during his Sunday evening stroll after dinner to no 'particular place' in Oakland for the purpose of 'killing time.'

"Appellant cites several cases but none wherein a workman's injuries have been declared compensable when they occurred, as here, on a non-working day; while he was on no errand for his employer; while he was boarding himself and eating where and when he pleased; while he was not engaged in travel movements incident to his employment, was not in any way under his employer's direction at the time he was injured, and was not injured by an instrumentality owned or controlled by the employer. We know of no such case.

"We hold that appellant Commissioner's finding that Kiel's injury occurred in the course of and arose out of his employment is not supported by the evidence. The uncontradicted evidence affirmatively shows the contrary and hence the presumption of §20 of the Longshoremen's and Harbor Workers' Act of March 4, 1927, ch. 509, 44 Stat. 1436, 33 U.S.C.A. §920, that Keil's claim comes within its provisions is overcome. Cf. *New York Life Ins. Co. v. Gamer*, 303 U.S. 616, 171, 58 S. Ct. 500, 82 L. Ed. 726, 114 A.L.R. 1218." (Italics ours)

The decision of the court below does not run afoul of the rule recently announced in the case of *Cardillo v. Liberty Mutual Insurance Company*, 330 U.S. 469, 91 L. ed. 1028, which requires factual and legal support to sustain the findings of a Deputy Commissioner (p. 479). Here the order of the Deputy Commissioner that the deceased's death "arose out of" and "in the course of his employment" is totally unsupportable in law or fact and since the record supplies no valid basis for any inference that Valak's death was an incident of his employment, the compensation order of the Deputy Commissioner is not in accordance with law (Section 21, Longshoremen & Harbor Workers' Act) and should be set aside.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision of the court below should be affirmed.

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